

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

HILARY BOWE RICKS
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ADAM C. THOMAS,)
)
Appellant-Petitioner,)
)
vs.) No. 49A04-0604-PC-201
)
STATE OF INDIANA,)
)
Appellee-Respondent.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
The Honorable Heather Welch, Master Commissioner
Cause No. 49G01-9909-PC-160308

November 28, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Adam C. Thomas appeals from the denial of his petition for post-conviction relief. Specifically, Thomas contends that the post-conviction court erroneously concluded that he did not receive the ineffective assistance of trial and appellate counsel. Finding that Thomas was effectively assisted by his trial and appellate attorneys, we affirm the judgment of the post-conviction court.

FACTS

The underlying facts, as set forth by this court on Thomas's direct appeal, are as follows:

At approximately 10:25 p.m. on September 6, 1999, two men with knives broke into the home of Carol and Stanley Slocum. The men were wearing black clothing, black ski caps, and handkerchiefs, which prevented the Slocums from seeing the intruders' faces. The men forced the Slocums into the laundry room, where they demanded the Slocums' money and guns. The men took cash, watches, wedding rings, and automobile keys from the Slocums and then tied each of the Slocums' hands and feet together. Both Carol and Stanley suffered skin abrasions when the intruders dragged Carol to a bathroom and dragged Stanley to the den. The intruders then made a number of trips from the house to the attached garage before they drove away with the Slocums' Geo Prism and GMC Suburban. When the Slocums untied themselves, they found that numerous items, including credit cards, jewelry, mint British coins, a portable CD player, a combination TV/VCR, cameras, and a fireproof lockbox, were missing from their home.

Two days later, on September 8, Thomas sold the Slocums' TV/VCR to Pawn Mart, a pawn shop. The next day, Thomas sold the Slocums' camera and camera lens to Cash America Pawn, another pawnshop.

Then, at approximately 11:20 p.m. on Friday, September 10, 1999, as Harry Evard was stepping out the back door of his home, two men attacked him. One man held Harry from behind while another man sprayed a fire extinguisher in his face and hit him on the head with the fire extinguisher. A third man entered the Evards' house and tackled Janet Evard onto the stairs, causing a chipped

bone in Janet's shoulder and a tear of her rotator cuff. The men, who were dressed in dark clothing and wore total facemasks, took Harry and Janet into the family room and "hog-tied" them with telephone wire. After demanding that the Evards tell them where their money, jewelry, guns, and car titles were, two of the men searched the house while one man guarded the Evards. After searching the house for over an hour, the men locked the Evards in a storage area on the second floor of their home. The men left with jewelry, cash, credit cards, suitcases, a CD player, electronic games, a Honda Accord, and a Subaru Outback Legacy.

Approximately four and a half hours after the three men left the Evards' home at 5:55 a.m. on September 11, Vernell Freeman and two other males checked into a Travelodge hotel in Louisville, Kentucky. Then at 2:00 p.m. on September 11, construction workers at the Travelodge found credit cards and driver's licenses, including the Evards', in a dumpster at the Travelodge. The Louisville Police Department began watching the Travelodge.

That evening, Thomas's co-defendants, Vernell Freeman and Josiah Jones, arrived at the Travelodge driving Harry Evard's Subaru. Thomas arrived at the Travelodge driving Janet Evard's Honda Accord. When the police removed Thomas and his female passenger from the Accord, Thomas said to the police, "She had nothing to do with it." When the police searched the Travelodge room rented to Freeman and the cars driven by Freeman and Thomas, they found numerous items stolen from the Evards and the Slocums.

Thomas v. State, No. 49A04-0012-CR-559, slip op. p. 2-5 (Ind. Ct. App. Oct. 5, 2001).

On September 15, 1999, the State charged Thomas, Freeman, and Jones each with two counts of class A felony burglary, three counts of class B felony robbery, one count of class A felony robbery, four counts of class B felony criminal confinement, and four counts of class D felony auto theft. The charges stemmed from the incidents involving the Slocums and the Evards. Thomas, Freeman, and Josiah were tried together on all fourteen counts in a jury trial that began on October 2, 2000. At the commencement of

the trial, the co-defendants moved to sever the charges relating to the Slocums from the charges relating to the Evards. The trial court denied the motion.

The jury found Thomas guilty as charged on October 6, 2000. Following a sentencing hearing, the trial court reduced the class A felony robbery conviction to a class B felony and sentenced Thomas to forty years for each of the two class A felony burglary convictions, to twenty years for each of the three class B felony robbery convictions, the four class B felony criminal confinement convictions, and the class A felony robbery conviction, and to three years for each of the four class D felony auto theft convictions. The trial court ordered all sentences to run concurrently except for the two class A felony burglary convictions, which were to run consecutively, for a total aggregate sentence of eighty years of incarceration.

Thereafter, Thomas brought a direct appeal of his convictions and sentences, arguing that the trial court abused its discretion when it excused a juror after deliberations had begun, that the trial court erroneously admitted certain evidence, and that the evidence was insufficient to sustain his convictions. On October 5, 2001, we affirmed the judgment of the trial court in full. Thomas, No. 49A04-0012-CR-559.

On September 13, 2005, Thomas filed an amended petition for post-conviction relief, arguing that he had received the ineffective assistance of trial and appellate counsel.¹ The post-conviction court held a hearing on Thomas's petition on November 11, 2005, at which Thomas presented evidence and testimony from a number of

¹ Thomas filed his original pro se petition for post-conviction relief on March 15, 2002. He filed his amended petition by counsel.

witnesses. Neither his trial nor appellate counsel recalled many details about their respective representation of Thomas. On February 2, 2006, the post-conviction court denied Thomas's petition. Thomas now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Trial Counsel

Thomas argues that he received the ineffective assistance of trial counsel. Specifically, he argues that his trial attorney was ineffective for failing to: (1) make a proper argument in moving to sever the Slocum charges from the Evard charges; (2) make a proper argument in moving to sever Thomas's trial from that of his co-defendants; and (3) investigate and present alibi evidence.

A. Standard of Review

As we consider Thomas's arguments, we observe that when evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel's performance was deficient. Strickland, 446 U.S. at 687. This requires a showing that counsel's representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

B. Severance of Offenses

Thomas first contends that his trial counsel was ineffective for failing to make a proper argument that the charges regarding the Slocum incident should be severed from

those regarding the Evard incident. Although his attorney objected to the joinder of the offenses because there was no evidence linking Thomas and his co-defendants to the Slocum incident aside from what was found as a result of the Louisville investigation, Thomas's trial counsel did not move for severance of the offenses based on statutory grounds.

Offenses may be joined in one cause where they are (1) of the same or similar character or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. Ind. Code § 35-34-1-9(a). Where offenses are joined solely on the basis that they are of the same or similar character, a defendant has the right to a severance of the offenses and the trial court has no discretion to deny that request. I.C. § 35-34-1-11(a). In all other cases, the trial court has discretion in determining whether to sever the offenses and must grant a severance motion if it is appropriate to promote a fair determination of the defendant's guilt or innocence. Id. In determining whether severance is appropriate, the trial court must consider the complexity of the evidence to be offered and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Id.

1. Automatic Severance

Thomas first contends that his trial attorney should have argued that he was entitled to automatic severance of the offenses because they were joined solely on the basis that they are of the same or similar character. See I.C. § 35-34-1-11(a). As noted by the State, however, in addition to pointing out the similarity of the Slocum and Evard offenses, the State also argued that the offenses should be joined because they were based

on the same conduct or a series of acts connected together that constitute part of a single plan or scheme.

Two offenses may be joined where there is a common modus operandi that links the crimes and the crimes are induced by the same criminal motive. Craig v. State, 730 N.E.2d 1262, 1265 (Ind. 2000). To establish a common modus operandi, the State must show a pattern of criminal behavior that is so distinctive that it may be recognized as the work of the same wrongdoer. Wilkerson v. State, 728 N.E.2d 239, 246 (Ind. Ct. App. 2000). Severance is not automatically required under the severance statute where the offenses are connected as part of a crime spree. Henson v. State, 707 N.E.2d 792, 796 (Ind. 1999).

Here, the record reveals that Thomas and his co-defendants engaged in a crime spree in which they burglarized the homes of elderly white people in Indianapolis to steal jewelry, electronic equipment, vehicles, and other property. The two incidents occurred approximately four days apart and both occurred at approximately the same time of night. The intruders demanded money, watches, jewelry, and guns in each incident. Furthermore, the intruders tied up the victims using whatever was at hand—telephone lines in one case and computer cables in another. The burglars wore dark clothing and had their hands and faces covered in both incidents. In both cases, the intruders ransacked the victims' residence and absconded with money, jewelry, electronic equipment, and vehicles. Subsequently, the intruders pawned the stolen property at Indianapolis pawnshops. The totality of this evidence establishes a common motive—the theft of property—and a pattern of criminal behavior that is sufficiently distinctive that it

may be recognized as the work of the same wrongdoer. Consequently, Thomas has not established that he was entitled to automatic severance of the offenses and his attorney was not ineffective for failing to object to the joinder of the charges on that basis.

2. Discretionary Severance

Thomas also argues that his attorney should have sought severance of the offenses under the discretionary prong of the statute. See I.C. § 35-34-1-11(a). As noted above, in determining whether a defendant is entitled to a discretionary severance of offenses, the trial court must consider the complexity of the evidence to be offered and whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense. Id.

Here, the evidence was not complex. It consisted primarily of the testimony of the two sets of victims regarding the incidents and the identification of their stolen property that was found with Thomas and his co-defendants. The other evidence merely related to the police investigation of the two incidents and the way in which the police located Thomas, his co-defendants, and the stolen property. The two incidents were separate and easily distinguishable from one another, so there was little chance that the jurors would confuse the two. Under these circumstances, it is apparent that Thomas was not prejudiced by his attorney's failure to seek a discretionary severance of the offenses, inasmuch as the trial court would almost certainly not have granted such a motion. Consequently, Thomas did not receive the ineffective assistance of trial counsel on this basis.

C. Severance from Co-Defendants

Thomas next contends that his trial counsel was ineffective for failing to make a proper argument in support of a motion for a trial separate from that of his co-defendants. At trial, Thomas's attorney argued for a separate trial based upon portions of the statement of one of Thomas's co-defendants. The trial court ordered the statement redacted and denied the motion for a separate trial. Thomas contends that his trial counsel should have made the additional argument that separate trials were required to promote a fair determination of his guilt or innocence. In support of this allegation, he merely contends that he was found guilty based solely upon his association with his co-defendants.

A defendant has no absolute right to a separate trial and the trial court has the discretion to determine whether to grant a motion for a separate trial. Williams v. State, 706 N.E.2d 149, 157 (Ind. 1999). Separate trials are required only where there are mutually antagonistic defenses and the acceptance of one defendant's theory precludes the acquittal of the other defendant. Id.

Here, the record reveals that the trial court redacted the problematic statement, that the respective attorneys for Thomas and his co-defendants cooperated with each other, and that the defendants each presented substantially the same defense—that the evidence was only sufficient to show that the respective defendant possessed stolen property. Moreover, if there had been separate trials, most, if not all, of the evidence about which Thomas complains would have been admitted because the incidents and evidence were so intertwined. Consequently, Thomas has established neither that he was entitled to a

separate trial nor that he was prejudiced by the trial court's failure to grant his motion for a separate trial. We conclude, therefore, that Thomas's trial counsel was not ineffective for failing to raise this argument in support of the motion for a separate trial.

D. Alibi

Finally, Thomas argues that his trial counsel was ineffective for allegedly failing to investigate and present alibi witnesses. The record reveals that Thomas presented evidence to the post-conviction court that tended to indicate that he informed his trial counsel of a possible alibi witness. PCR Ex. 3. But he offered no evidence that the alibi witness was either legitimate or believable. Specifically, Thomas offered only the testimony of Tamara Barnes, his ex-girlfriend and the mother of his son, who stated that she could not provide an alibi for Thomas because she could not recall if she was with Thomas or knew of his whereabouts at the time of the incidents. See Grinstead v. State, 845 N.E.2d 1027, 1033 (Ind. 2006) (finding that defendant's claim that a witness who he contended should have been called at trial would have recalled the incident better at the time of trial was "plausible but plainly speculative"). Barnes also could not recall if she spoke with Thomas's trial counsel about the alibi. Thomas did not testify at the post-conviction hearing, so there is no evidence establishing the substance of the alibi evidence that was allegedly available to his trial attorney.

The lack of evidence regarding Thomas's supposed alibi is fatal to Thomas's claim of ineffective assistance of counsel. See Harrison v. State, 707 N.E.2d 767, 778 (Ind. 1999) ("[b]ecause [the defendant] presented no evidence at his postconviction hearing to support the . . . alibi, there is no basis to conclude either that trial counsel were

deficient or that [the defendant] suffered any prejudice from that issue”). Consequently, we conclude that Thomas’s trial attorney was not ineffective for allegedly failing to investigate and present alibi witnesses.

II. Appellate Counsel

Thomas also argues that he received the ineffective assistance of appellate counsel. In particular, he contends that his appellate attorney was ineffective for failing to: (1) argue that the trial court erred in refusing to sever the Slocum charges from the Evard charges and in refusing to sever Thomas’s trial from that of his co-defendants; (2) argue that the evidence was insufficient to support one of his class A burglary convictions; (3) argue that the trial court erred in imposing consecutive sentences; and (4) file a petition to transfer based upon this court’s affirmance of the trial court’s decision to remove a juror during deliberations.

A. Standard of Review

Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id. To show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of

adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000).

Our Supreme Court has adopted the following test to evaluate the performance prong of appellate counsel's performance: (1) whether the unraised issues are significant and obvious from the record; and (2) whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." Bieghler, 690 N.E.2d at 194. Further, the reviewing court must consider the totality of an attorney's performance to determine whether the client received constitutionally adequate assistance, and "should be particularly sensitive to the need for separating the wheat from the chaff in appellate advocacy, and should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Id.

B. Severance Claims

We have already concluded above that Thomas has not established that he was entitled to severance of the offenses or to a separate trial from his co-defendants. Moreover, inasmuch as Thomas's trial attorney did not raise these specific arguments at trial, his appellate attorney could not have raised them for the first time on appeal. See Fuller v. State, 852 N.E.2d 22, 25 (Ind. Ct. App. 2006) (holding that a defendant cannot change his grounds for an alleged error on appeal and is limited to arguing the grounds

that he raised at trial). Consequently, we conclude that his appellate attorney was not ineffective for failing to raise these arguments on direct appeal.

C. Sufficiency of the Evidence Claim

Thomas next contends that his appellate attorney was ineffective for failing to argue that the evidence was insufficient to support his conviction for class A burglary stemming from the Slocum incident. To prove that a defendant has committed burglary, the State must establish that he broke and entered the building or structure of another person with the intent to commit a felony—here, theft—therein. I.C. § 35-43-2-1. The offense is elevated to a class A felony if it “results in” bodily injury. Id.

In the Slocum incident, Thomas and his co-defendants broke and entered the Slocum residence. After entering the residence, the intruders forced the Slocums into their laundry room, tied them up, and then dragged them into other rooms in the house. The Slocums suffered skin abrasions as a result of the dragging.

Thomas directs our attention to the well-established rule that a burglary is complete upon the perpetrator’s breaking and entering the building with the intent to commit a felony therein. Smith v. State, 671 N.E.2d 910, 912 (Ind. Ct. App. 1996). He argues that because the Slocums sustained their injuries after the intruders had broken and entered the residence—and, therefore, after the completion of the burglary—the evidence was insufficient to support his conviction for class A felony burglary.

The burglary statute, however, elevates the offense to a class A felony if it “results in” bodily injury. I.C. § 35-43-2-1. The statute does not require that the bodily injury be sustained “during” the commission of the burglary. It is readily apparent that here, even

if the burglary was technically complete at the time Thomas and his cohorts broke and entered the Slocum residence, the injuries that they sustained were a direct result of that burglary. Consequently, it was reasonable for Thomas's appellate counsel to have determined that there is sufficient evidence supporting this conviction and we conclude that the attorney was not ineffective for failing to raise the argument on direct appeal.

D. Consecutive Sentencing Claim

Thomas next argues that his appellate attorney was ineffective for failing to argue that the trial court erred in imposing consecutive sentences and in selecting the sentences for the highest class of offense—class A felony—to run consecutively rather than using any of the lesser classes of felony convictions. Thomas seems to contend that his appellate attorney should have argued that the consecutive sentences were manifestly unreasonable in light of the nature of the offenses and his character.²

The trial court sentenced Thomas to forty years for each of the two class A felony burglary convictions, to twenty years for each of the three class B felony robbery convictions, the four class B felony criminal confinement convictions, and the class A felony robbery conviction, and to three years for each of the four class D felony auto theft convictions. The trial court ordered all sentences to run concurrently except for the two class A felony burglary convictions, which were to run consecutively, for a total aggregate sentence of eighty years of incarceration.

² Although the standard is now whether the sentence is inappropriate in light of the nature of the offense and character of the offender, at the time Thomas was sentenced, we questioned whether the sentence was manifestly unreasonable. See McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

As to the nature of the offenses, we first observe that Thomas’s convictions involved multiple crimes on different days and four separate victims. See O’Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001) (holding that consecutive sentences are proper where there are multiple crimes or multiple victims). Furthermore, the record reveals that Thomas and his co-defendants terrorized four elderly individuals for substantial periods of time, inflicted injuries on them, left their homes in shambles, and stole items of personal, sentimental, and monetary value.

As to Thomas’s character, the trial court acknowledged his young age—nineteen at the time of the offenses—and the fact that he had expressed remorse and apologized to the victims for the part he had played in the offenses. But Thomas had amassed a lengthy criminal record for someone of such a young age—his criminal history consisted of five juvenile true findings for offenses that would have been misdemeanors or class D felonies if committed by an adult, and one class D felony conviction as an adult.

Given the nature of the offenses, Thomas’s character, and the fact that the trial court did not impose the maximum sentence for the class A felony burglary convictions,³ it was reasonable for Thomas’s appellate attorney to have concluded that it was unlikely that an appellate court would have found the consecutive sentences manifestly unreasonable. Consequently, we conclude that appellate counsel was not ineffective for failing to raise this argument.

³ At the time of sentencing, the trial court could have imposed a fifty-year sentence for each of the class A felony burglary convictions. Ind. Code § 35-50-2-4. Instead, the trial court imposed forty-year sentences for each of the two class A felony burglary convictions.

E. Failure to File Petition to Transfer

Finally, Thomas contends that his appellate attorney was ineffective for failing to file a petition to transfer regarding this court's resolution of one of the issues raised on direct appeal. Specifically, Thomas argues that his attorney should have sought review by our Supreme Court with respect to this court's holding that the trial court did not abuse its discretion in removing a juror after deliberations had begun.

During jury deliberations, the jury sent the trial court a note indicating problems with juror George Watson. The trial court questioned Watson, who stated that he was incapable of judging others, that he had misunderstood his duties as a juror, and that he had stayed for the trial only because he believed he was required to do so. The trial court then dismissed Watson and replaced him with an alternate juror.

At the time of Thomas's direct appeal, we reviewed a trial court's decision regarding juror removal for an abuse of discretion. Spears v. State, 811 N.E.2d 485, 488 (Ind. 2004). Pursuant to Indiana Trial Rule 47(B), a trial court was entitled to replace jurors with alternate jurors if the jurors are unable or disqualified to perform their duties. On direct appeal, we found that the trial court did not abuse its discretion in removing Watson, reasoning that Watson was incapable of fulfilling his duties as a juror. See LeFlore v. State, 823 N.E.2d 1205, 1210 (Ind. Ct. App. 2005) (holding that a juror was unable to perform her duties pursuant to Trial Rule 47(B) and therefore properly removed during deliberations where the juror stated that she could not, in good conscience, make a decision about another person's fate), trans. denied.

Thomas argues that his appellate counsel should have filed a petition to transfer based upon this holding. As support for this argument, he directs our attention to Riggs v. State, in which our Supreme Court held that after deliberations have begun, “discharge of a juror is warranted only in the most extreme situations where it can be shown that the removal of the juror is necessary for the integrity of the process, does not prejudice the deliberations of the rest of the panel, and does not impair the parties’ right to a trial by jury.” 809 N.E.2d 322, 327-28 (Ind. 2004). Although Riggs had not yet been decided at the time of Thomas’s direct appeal, Thomas argues that the decision shows that if his appellate attorney had filed a petition to transfer on this issue, our Supreme Court would have granted transfer and reversed this court’s holding on the matter.

As noted by the State, however, it is well settled that an appellate attorney is not ineffective for failing to anticipate changes in the law or for failing to effect changes in the law. Wieland v. State, 848 N.E.2d 679, 683 (Ind. Ct. App. 2006), trans. denied. Thus, we cannot conclude that Thomas’s appellate attorney was ineffective for failing to file a petition to transfer anticipating our Supreme Court’s predilection to change the law regarding removal of jurors during deliberations as reflected by Riggs. Moreover, given Watson’s statements to the trial court that he was essentially unable to pass judgment on Thomas, appellate counsel could have reasonably concluded that it would have been fruitless to seek transfer regarding this court’s conclusion that the trial court did not abuse its discretion in dismissing Watson. Thus, we conclude that Thomas’s appellate attorney was not ineffective for failing to file a petition to transfer on this issue.

The judgment of the post-conviction court is affirmed.

VAIDIK, J., and CRONE, J., concur.